SUPREME COURT, U. S.

FILED

In the Supreme Court of the United States

OCTOBER TERM, 1968

JOSEPH LEE JONES AND BARBARA JO JONES, PETITIONERS

v.

ALFRED H. MAYER COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ERWIN N. GRISWOLD,
Solicitor General,
LOUIS F. CLAIBORNE,
Assistant Attorney General,
BRIAN P. GETTINGER,
Attorney,
Department of Justice,
Washington, D.C. 20530.

INDEX

288-823—68——1

CITATIONS

Cases:

Cases—Continued

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 645

JOSEPH LEE JONES AND BARBARA JO JONES, PETITIONERS

v.

ALFRED H. MAYER COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (A. 43–66 [1]) is reported at 379 F. 2d 33. The opinion of the district court (A. 15–41) is reported at 255 F. Supp. 115.

JURISDICTION

The judgment of the court of appeals (A. 42) was entered on June 26, 1967, and the petition for a writ of certiorari was granted on December 4, 1967. The jurisdiction of this Court rests on 28 U.S.C. 1254.

[1] Our references are to the record "Appendix" filed by the petitioners, which is bound with a light-gray cover. Another, differently paginated, "Appendix," with a buff-colored cover, has been filed by one group of *amici*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Thirteenth Amendment provides:

> SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

Sections 1 and 5 of the Fourteenth Amendment provide:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * * *
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Section 1978 of the Revised Statutes (42 U.S.C. 1982) provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Relevant Missouri statutes and provisions of St. Louis County ordinances are printed in the Appendix, *infra,* pp. 63–92).

QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment, of its own force, prohibits the developers of a large suburban community from refusing to sell homes in the subdivision to Negroes, solely on account of their race.

2. Whether Section 1978 of the Revised Statutes prohibits such a racial exclusion.

STATEMENT OF THE CASE

On September 2, 1965, petitioners, Joseph Lee Jones and his wife Barbara J. Jones, filed a complaint in the United States District Court for the Eastern District of Missouri, alleging a discriminatory refusal to sell them a home in the Paddock Woods community of St. Louis County because one of them is a Negro (A. 3–13). The defendants (respondents here) were: the Alfred H. Mayer Company, a corporation "engaged in the business of developing subdivisions, * * * operating as a construction company in building homes * * * to be resold to the public" (A. 5); the Alfred Realty Company, "the exclusive sales agent of the houses built by * * * Alfred H. Mayer Company;" Alfred H. Mayer, who "owns a controlling interest in both said corporations" (A. 3–4) and serves as their "managing officer and * * * guiding policy maker" (A. 5); and Paddock Country Club, Inc., a corporation controlled by the other defendants, which operates a golf course "for

the primary use and benefit" of the residents of Paddock Woods and neighboring subdivisions under the same control (A. 10).

According to the allegations of the complaint (which must be taken as true, since the case was dismissed at the pleading stage), Paddock Woods is planned as a complete suburban community (A. 9–11). When completed, the development will house 1,000 people and form part of an even larger complex of similar developments constructed in the area by the same developer, in some cases (not including Paddock Woods) with financing by the Federal Housing Administration (A. 9–10). This complex—which will house a total of some 2,700 families—will include recreational facilities (golf course plus tennis and bath club) built by the developer for the primary benefit of the residents (A. 10). The developer has laid out streets for the use of the residents and has undertaken to provide such community services as garbage collection, all controlled by a board of trustees appointed by him (A. 10–11). The board will also have the legal authority to levy assessments and to collect them through judicial action (A. 11).

In order to create this Paddock Woods community, the respondents were required to comply with the "Subdivision Regulations" embodied in Chapter 1005 of the St. Louis County Ordinances (App. *infra,* pp. 69 *et seq.*), and enacted pursuant to Section 64.060 of the Missouri Statutes. Under those regulations a subdivision may not be developed until the St. Louis County Planning Commission has approved

it. Section 1005.180 provides that there will be no final approval until the developer has either completed or filed a satisfactory surety bond to insure the completion of the following improvements to the land:

(1) Permanent markers showing all subdivision boundary corners and the four corners of all street intersections.

(2) Graded streets and surfaced roadways. All grading and surfacing shall be done under supervision of the County Highway Engineer and shall be subject to approval.

(3) Sidewalks constructed in accordance with St. Louis County specifications.

(4) Facilities for providing a water supply. The ordinance provides for construction of any water supply system under supervision of the County Health Department.

(5) Sewers. In this case the Metropolitan St. Louis Sewer District required an escrow arrangement to guarantee the proper construction of the sewer system and required that the sewers and related appurtenances and easements be dedicated to the sewer district.

(6) Street trees.

(7) Street signs installed under the supervision of the County Highway Engineer.

The regulations further provide for the deposit of a substantial sum in escrow to insure that these improvements are made, stipulating that if the developer fails to complete the improvements in two years, the County Planning Commission may itself use the

escrowed funds to finish the work (Section 1005.180). Various State agencies, including the Planning Commission, the Highway Division, and the Sewer District, are required to inspect the progress of the subdivision during the planning stages and as construction progresses (Section 1005.180).

The complaint particularizes that the petitioners, desiring to purchase a new home and prompted by a public advertisement in the St. Louis *Post-Dispatch,* inspected houses and lots in Paddock Woods; that they offered to buy from respondents a house and lot in the Paddock Woods development; and that the respondents refused to sell to them because petitioner Joseph Lee Jones is a Negro (A. 5–7). Petitioners sought a judgment requiring respondents to sell them a home of the type described in the complaint and enjoining further discrimination in the sale of homes (A. 13). There was also a prayer for actual damages of $50.00 and punitive damages of $10,000 (A. 13).

The district court sustained the respondents' motion to dismiss on May 18, 1966 (A. 14), holding that their action in refusing to sell a house to the petitioners was purely individual and not State action (A. 18–41). On June 26, 1967, the Court of Appeals for the Eighth Circuit affirmed (A. 42).

SUMMARY OF ARGUMENT

I

It is a commonplace of our society that the activities of government and private enterprise are frequently intertwined. This is particularly true of the

large scale planning and investment characteristics of a substantial housing development. Whole new communities are being erected in the suburbs of our cities pursuant to arrangements in which governmental authorities and private entrepreneurs are deeply and jointly involved. Accordingly, the first question in this case is whether there is such a degree of State involvement in the construction of Paddock Woods and its sister communities that its builders take on obligations, as well as privileges, associated with municipalities—more particularly, the obligation under the Fourteenth Amendment to refrain from fencing a minority race out of the community.

We begin with the familiar proposition that the State may not limit the availability of housing on the ground of race, whether by zoning ordinance, restrictive covenant, or the enforcement of segregation by any other means. It is, of course, equally well settled that such restrictions on State action apply as well to instrumentalities which, though private in form, are governmental in substance.

Applying these principles, we conclude that respondents, in operating their new community, act in much the same manner as a municipal corporation. They begin by establishing community boundaries, with the review and approval of the State. With State review and approval they establish streets, sewers, and recreational facilities—services the public has come to expect from its municipal governments. They establish rules which the residents of the community must follow and which the State enforces. They ap-

point a governing body, the board of trustees for Paddock Woods. They furnish continuing services, such as rubbish collection, and levy assessments—enforceable by judicial process—to pay for the services. They enter into compacts with other governmental instrumentalities such as the sewage districts. And these acts are done under the supervision of a complex structure of district, county and State agencies, under State law. In sum, respondents do not occupy the position of an individual property owner. They are clothed in significant measure with State authority, and that authority has served, again in significant measure, to create and sustain the community.

II

Alternatively, we argue that if the respondents' conduct cannot fairly be characterized "State action," governed by the Equal Protection Clause of its own force, it is nevertheless prohibited by Section 1978 of the Revised Statutes (42 U.S.C. 1982).

That statute, first passed in 1866 to enforce the Thirteenth Amendment and re-enacted in 1870 after the adoption of the Fourteenth Amendment, implements both constitutional provisions. In our view, it reaches at least all measures, official or unofficial, which have the purpose and effect of wholly fencing out an entire racial class from a substantial residential community, In those circumstances, we think it plain the excluded class is effectively deprived of the statutory guarantee that they shall have "the same right * * * as is enjoyed by white citizens * * * to * * * purchase [and] lease * * * real * * * property."

Examination of the context and legislative history of the provision reveals no reason not to give the text its natural meaning. The provision was designed to grant more than mere legal capacity to hold real estate, as decisions of this Court make plain. Nor do we believe there exists any textual, historical, or constitutional obstacle to applying Section 1978, as its words suggest, to wholly private action—at least when the conduct involved threatens the right guaranteed as effectively as State action. And, finally, we submit the provision prohibits equally outside coercion against willing buyers and sellers and, as here, a voluntary policy of fencing out Negroes.

ARGUMENT

I. THE FOURTEENTH AMENDMENT, OF ITS OWN FORCE, PROHIBITS THE CONDUCT DESCRIBED IN THE COMPLAINT

A. THE FOURTEENTH AMENDMENT FORBIDS STATE ACTION SUPPORTING RACIAL SEGREGATION IN HOUSING

It is of course well settled that the "Fourteenth Amendment * * * operate[s] to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color." *Buchanan* v. *Warley,* 245 U.S. 60, 79. See, also, *Harmon* v. *Tyler,* 273 U.S. 668; *Richmond* v. *Deans,* 281 U.S. 704. Nor is it only legislative measures that are reached. Judicial enforcement of racially restrictive covenants is equally forbidden by the Amendment (*Shelley* v. *Kraemer,* 334 U.S. 1; and see *Barrows* v. *Jackson,* 346 U.S. 249), as are less compulsive forms of State action. *Reitman* v. *Mulkey,* 387 U.S. 369.

Thus, it is plain that the complete exclusion of Negroes from the community in suit—a fencing out of much more substantial proportions than was involved in the cases cited—would fall under the ban of the Fourteenth Amendment if the action of the corporate owner may properly be characterized as "State action."

In approaching that question it is relevant to notice that the right to freedom from discrimination in housing has enjoyed a special status under the Fourteenth Amendment. Indeed, that Amendment was proposed, in part, to vindicate and place beyond repeal the Civil Rights Act of 1866 (14 Stat. 27), which already guaranteed citizens "of every race and color" the "same right * * * to inherit, purchase, lease, sell, hold, and convey real and personal property * * * as is enjoyed by white citizens."[2] And the same provision was re-enacted as part of the very first measure implementing the Amendment. Act of May 31, 1870, § 18, 16 Stat. 140, 144 (see Point II, *infra*, pp. 20 *et seq.*).

Nor has this Court ignored the unique claim of this civil right under the Equal Protection Clause. The fact is that State-imposed residential segregation was held unconstitutional as early as 1917 (*Buchanan* v. *Warley, supra*) at a time when enforced segregation in public and private schools (*Berea College* v. *Ken-*

---

[2] See *Civil Rights Cases*, 109 U.S. 3, 22; *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369; *Buchanan* v. *Warley*, *supra*, 245 U.S. at 78–79; *Oyama* v. *California*, 332 U.S. 633, 640, 646; *Shelley* v. *Kraemer*, *supra*, 334 U.S. at 10–11; *Hurd* v. *Hodge*, 334 U.S. 24, 32–33; *Takahashi* v. *Fish Comm'n*, 334 U.S. 410, 419–420.

tucky, 211 U.S. 45; see *Gong Lum* v. *Rice,* 275 U.S. 78, 85–87; *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337, 344, 349), transportation (*Plessy* v. *Ferguson,* 163 U.S. 537; see *McCabe* v. *Atchison, Topeka & Santa Fe Railway Co.,* 235 U.S. 151, 160), and in other activities (*e.g., Pace* v. *Alabama,* 106 U.S. 583) was condoned. So, also, it is revealing that in the restrictive covenant cases (*Shelley* v. *Kraemer, supra; Hurd* v. *Hodge, supra; Barrows* v. *Jackson, supra*), the Court found prohibited "State action" in the apparently neutral judicial enforcement of private discriminatory agreements—invoking a doctrine which it has declined to follow elsewhere. See, *e.g., Bell* v. *Maryland,* 378 U.S. 226, 328–333 (opinion of Black, J., dissenting). As was observed in *Shelley* v. *Kraemer, supra,* 334 U.S. at 10:

> It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. * * *

We accordingly conclude that the Fourteenth Amendment's injunction against discrimination is to be applied strictly to residential segregation and that it is indeed appropriate to search out State action which supports discrimination of this character.

B. THE RESPONDENTS EXERCISE STATE POWER AND PERFORM GOVERNMENTAL FUNCTIONS

This Court early recognized that the Fourteenth Amendment's restrictions on action by the "State" extend to one who "acts in the name and for the State, and is clothed with the State's power * * *." *Ex parte Virginia,* 100 U.S. 339, 347. The restrictions cover "exertions of state power in all forms". *Shelley* v. *Kraemer, supra* at 20. The reason is clear: "This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it." *Ex parte Virginia, supra.* The words "No State shall" are "addressed, of course, to the States, but" the limitations of the Amendment were to extend "also to every person whether natural or juridical who is the repository of state power." *Home Telephone & Telegraph Co.* v. *Los Angeles,* 227 U.S. 278, 286. Thus it was said in *Virginia* v. *Rives,* 100 U.S. 313, that "the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by [its legislative, executive, or judicial authorities] or *by another.*" 100 U.S. at 318 (emphasis added).

Following this consistent interpretation of the Amendment, this Court has found "State action" in a variety of instances: actions of a municipal corporation even though unauthorized (*Home Telephone and Telegraph Co.* v. *Los Angeles,* 227 U.S. 278); actions of law officers contrary to State law (*Screws* v. *United States,* 325 U.S. 91; *Williams* v. *United*

States, 341 U.S. 97); actions of a private corporation with the characteristics of a municipality (*Marsh* v. *Alabama,* 326 U.S. 501); actions of a private political party carrying out the State function of determining voter eligibility for primary elections (*Nixon* v. *Condon,* 286 U.S. 72; *Terry* v. *Adams,* 345 U.S. 461); actions of a private restaurateur providing food service in a city-owned parking structure (*Burton* v. *Wilmington Parking Authority,* 365 U.S. 715); and actions of private trustees of a private city park which had formerly been held and maintained by the city (*Evans* v. *Newton,* 382 U.S. 296). Similarly, constitutional limitations have been held applicable to those who exercise essentially governmental power derived from federal law, whether a regulated public transit monopoly (*Public Utilities Comm'n* v. *Pollack,* 343 U.S. 451) or labor unions recognized as exclusive bargaining agents of a class of employees (*Steele* v. *L. & N.R. Co.,* 323 U.S. 192; *Railroad Trainmen* v. *Howard,* 343 U.S. 768; *Syres* v. *Oil Workers,* 350 U.S. 892; see *Machinists* v. *Street,* 367 U.S. 740).

In none of these cases were the condemned acts expressly authorized by law; in some, they were explicitly prohibited; and in several, the acts were committed by "private" parties. The one common denominator is that in each instance the actor was a repository of some aspect of State power. Because they possessed State power they were held to have assumed State obligations in its exercise.

The same principle, we believe, controls this case. To be sure, no State flag flies over Paddock Woods

and none of the respondents wears an official badge of State office. But, as *Marsh* and *Terry* v. *Adams* make clear, that is not critical. As we show presently, there are continuing legal ties between the State and the housing development in suit. Yet, even that formal connection is not essential. The controlling considerations in this case, it seems to us, are that Paddock Woods exists by virtue of a delegation of State powers, and that those who rule the community, although they wear no uniform and hold no official title, wield those powers to perform essentially governmental functions.

That is, in part, a consequence of size. To take extreme examples, we suppose no one would question the applicability of constitutional restrictions to the immense land holdings of the private stock companies and individual proprietaries of early America if they existed today. Indeed, although the Virginia Company (after 1609) elected its own governing board and managed its large domain without official aid or interference, and Lord Baltimore held Maryland as a private owner, it is obvious they were exercising governmental powers. See 1 Morison and Commager, *The Growth of the American Republic* (1962), pp. 43–48, 52–53; Commager, *Documents of American History* (6th ed. 1958), pp. 10–13; 21–22. So, here, albeit in much smaller compass, the managers of Paddock Woods must necessarily wield the authority of local governors because their community is, in most respects, a "town."

Indeed, in most essential respects, Paddock Woods is comparable to the company towns involved in *Marsh*

v. Alabama, supra, and *Tucker* v. *Texas,* 326 U.S. 517, which the Court held were subject to constitutional limitations applicable to municipalities. Here, as there, "the corporation's property interests [do not] settle the question" (326 U.S. at 505); that circumstance "cannot control issues of civil liberties which arise precisely because a company town is a town as well as a congeries of property relations" (*id.* at 511, Frankfurter, J., concurring).

A review of the creation and maintenance of Paddock Woods shows that the existence of such a subdivision is made possible by the State; that the State expects (and in some cases requires) the managers of the new community to fill the gap that results from the absence of any formal municipal government in Paddock Woods; and that the State has invested them with the coercive tools for regulating and taxing the inhabitants of Paddock Woods so that they may fulfill these duties.

The creation of a whole suburban community raises problems unknown to the individual homeowner or the city apartment owner. The developer begins with a plot of land reflecting none of the characteristics of a modern community. A subdivision, however, must have public roads and sidewalks, sewers, parks, access to schools, police and fire protection. In Missouri, as in other States, these services and facilities are supplied by or on behalf of the State.[8] The subdivider

[8] See authority given political subdivisions by Mo. Stat. §§ 71.340 (construct and repair public roads), 80.180 (provide sidewalks), 90.010 (establish and maintain parks), 89.040 (zoning power to facilitate adequate provisions for schools), 80.260 (maintain peace), 71.380 (fire protection).

provides many of them: by obtaining State approval of his plans, by building streets and sewers and dedicating them to the State, by paying for fire protection, by transferring park land to trustees he appoints. He provides such services because business considerations and State law require it.[4] On occasion, the State law requirement is contingent on there being no municipality which can perform the function.[5]

A subdivision developer must not only provide physical facilities and services; he must establish rules for governing the community. Restrictions, in essence zoning laws, must be placed on the use of the property. This essential State function (see *Village of Euclid* v. *Ambler Realty,* 272 U.S. 365) is delegated by the State to the subdivider.[6] And the respondents

---

[4] See St. Louis County Ordinances, Chap. 1005, § 1005.180 (markers, streets, sidewalks, water and sewage systems, fire protection, trees, signs), § 1005.160 (schools and parks).

[5] St. Louis County Ordinances, Chap. 1005, § 1005.150 provides that maintenance for public facilities must be provided by the subdivision developer if no other public agency is available. It may be noted that Paddock Woods meets the qualifications set by Mo. Stat. § 72.040 for "cities of the fourth class" and, therefore, the residents could incorporate as a municipality if they elected to do so.

[6] Section 1005.150 of the St. Louis County Ordinances provides:

> The Commission shall confer with the subdivider regarding the type and character of development that will be permitted in the subdivision and may agree with the subdivider as to certain minimum restrictions to be placed upon the property to prevent the construction of substandard buildings, control and the type of structures, or the use of the lots which, unless so controlled, would clearly depreciate the character and value of the proposed subdivision and of adjoining property. Deed restrictions or

have utilized this authority to promulgate "zoning ordinances" in the form of restrictive covenants which, among other things, forbid homeowners from using their lots for commercial businesses, temporary structures, signs, livestock, poultry, and noxious or offensive activity.[7] These covenants are, of course, enforceable in the State's courts. See, *e.g.*, *Andrews* v. *Metropolitan Bldg. Co.*, 349 Mo. 927, 163 S.W. 2d 1024.

So, also, one of the main attributes of a municipal government is its power to levy assessments for cer-

---

covenants should be included to provide for the creation of a property owners' association or board of trustees for the proper protection and maintenance of the development in the future, provided, however, that such deed restrictions or covenants shall not contain reversionary clauses wherein any lot shall return to the subdivider because of a violation thereon of the terms of the restrictions or covenants. Where the subdivision contains sewers, sewage treatment plants, water supply systems, park areas, street trees or other physical facilities necessary or desirable for the welfare of the area or that are common use or benefit which are not or cannot be satisfactorily maintained by any existing public agency, provisions shall be made by trust agreement made a part of the deed restrictions, acceptable to any agency having jurisdiction over the location and improvement of such facilities, for the proper and continuous maintenance and supervision of such facilities.

Compare Mo. Stat. 89.040 setting out the purposes for which the municipal zoning power might be used and stating that "regulations shall be made with reasonable consideration * * * to the character of the district * * * and with a view to conserving the values of buildings * * *."

[7] Compare Mo. Stat. 89.030 granting local legislative bodies a zoning power which may be used to "regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures, or land."

tain limited public purposes. Respondents have that power to levy assessments for community improvements and, if necessary, to establish property liens to secure payment of the assessments.[8] The new members of the community will also, in effect, pay a tax (in the form of a higher price for their homes) to defray the cost of establishing streets, sidewalks, sewers, a water system, and the other municipal facilities furnished by the respondents.

Thus, it is clear that the respondents, in activities essential to the development of the Paddock Woods community, are clothed with State authority, and daily perform governmental tasks, making and executing essentially governmental decisions. The claim is advanced, however, that the exclusion of Negroes from Paddock Woods is not a decision of that character, but, rather, the exercise of a private landowner's prerogative to sell or refuse to sell to anyone, on any ground. We turn to that argument.

C. THE RESPONDENTS ARE GOVERNED BY THE FOURTEENTH AMENDMENT IN THEIR ADMISSION POLICY

The suggestion that respondents, as owners and operators of Paddock Woods, are repositories of State power—and therefore subject to the Fourteenth Amendment—for some purposes, but not with respect

[8] It is so alleged in the complaint (A. 11), which must be accepted as stating the true facts. Presumably the power to levy assessments is incorporated in the trust instrument pursuant to the last sentence of Section 1005.150 of the St. Louis County Ordinances, quoted in note 6, *supra*. Compare Mo. Stat. § 71.290 giving Missouri towns and vilages power to levy assessments for public improvements.

to their admission policy (see A. 36–37), does not withstand scrutiny. There is no basis for characterizing the racially exclusive policy followed here as a "private" decision, unrelated to respondents' status as delegates of the State, exercising governmental functions.

There is no precedent for the suggestion that a State agency may avoid the mandate of the Constitution for some of its actions. Certainly, the State itself is no more free to discriminate when acting in a "proprietary" capacity than when performing a "governmental" function. Cf. *Burton* v. *Wilmington Parking Authority, supra.* So, also, a State officer, so long as he wears the clothes of office, is subject to the Fourteenth Amendment, although his acts are unauthorized by law (*Ex parte Virginia, supra*) or even contrary to State law (*Screws* v. *United States, supra*). Nor is that obligation avoided because the official is serving his own ends or other private interests, rather than those of the State. *Pennsylvania* v. *Board of Trusts,* 353 U.S. 220; *Griffin* v. *Maryland,* 378 U.S. 130. Cf. *Shelley* v. *Kraemer, supra.* Similarly, here, we see no basis to exempt the action of the managers of Paddock Woods in formulating and executing a policy of racial exclusion.

The fact is, moreover, that, both in origin and effect, the total fencing out of Negroes from a community of this size is itself an exercise of governmental power. Indeed, it is only by virtue of delegated authority from the State that this "private town" exists and that the municipal functions are controlled by a

single corporation. In these circumstances, the company's decision to adopt a policy of racial exclusion is not remotely like that of an individual landowner. The decision is made on behalf of the entire community, presumably motivated by the same public considerations that would influence a municipal government. Realistically viewed, it is an impermissible exercise of the zoning power.

And, of course, the effect is the same. Just as the State in *Terry* v. *Adams* could not "permit within its borders the use of any device that produces an equivalent of the prohibited election" (345 U.S. at 469), so, here, the respondents may not, by their exclusionary policy, produce the equivalent of a forbidden racial zoning ordinance.

II. THE CHALLENGED CONDUCT IS ALSO EMBRACED BY SECTION 1978 OF THE REVISED STATUTES

We have attempted to show that the Fourteenth Amendment, of its own force, outlaws the conduct revealed in the record. We believe that argument is fully sufficient to support the present complaint. Petitioners, however, have consistently contended that their case is also ruled by Section 1978 of the Revised Statutes, 42 U.S.C. 1982, which provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." This statutory argument raises a discrete set of issues. Although Section 1978, in our view, reaches both acts taken "under color of law" and wholly private action, we

invoke the provision, alternatively, only on the premise that the challenged conduct is not State action and accordingly is not governed by the Equal Protection Clause, *ex proprio vigore.*

At the outset, we note that Section 1978—unlike 18 U.S.C. 241—is not one of those "hastily adopted" products of "[s]trong postwar feeling [that] caused inadequate deliberation and led to loose and careless phrasing of laws relating to the new political issues" (*United States* v. *Williams,* 341 U.S. 70, 74, opinion of Frankfurter, J.). Nor was it—as has been said of 42 U.S.C. 1985—the work of extremist Radicals, "passed by a partisan vote in a highly inflamed atmosphere" (*Collins* v. *Hardyman,* 341 U.S. 651, 657). Section 1978 has an older and more authentic pedigree. Together with its companion, Section 1977 (42 U.S.C. 1981), it derives from Section 1 of the first Civil Rights Act, of 1866 (14 Stat. 27), passed, after full debate,[9] in the relative calm of the 39th Congress which framed the proposal for the Fourteenth Amendment. The legislation was no aberration of the moment: it survived only because both the House and the Senate—neither yet dominated by Radical Republicans (See Stampp, "The Era of Reconstruction, 1865–1877" (1965), pp. 83–86, 110–117)—overrode a presidential veto by the requisite majorities (see Cong. Globe, 39th Cong., 1st Sess., pp. 1809, 1861), and it

[9] The debates on the Civil Rights Act of the Act of 1866 cover some 134 pages in the Congressional Globe. See Cong. Globe, 39th Cong., 1st Sess., pp. 211–212, 474–481, 497, 507, 522–530, 569–578, 594–606, 1115–1125, 1151–1162, 1262–1272, 1290–1296, 1366–1367, 1413–1416, 1755–1761, 1775–1787, 1801–1809, 1832–1837.

was expressly re-enacted 4 years later (Act of May 31, 1870, § 18, 16 Stat. 140, 144) and codified in the Revised Statutes of 1874 and 1878. Indeed, in the landmark *Civil Rights Cases,* 109 U.S. 3, 16, 22, invalidating provisions of the Civil Rights Act of 1875, this Court contrasted that last measure of the Reconstruction series with the first, which was viewed as a model of constitutional legislation. It was there observed, with obvious approval, that in 1866 "Congress did not assume * * * to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery." 109 U.S. at 22.

Nor have the provisions of the Civil Rights Act of 1866 remained a dead-letter since they were given their place in the Revised Statutes. As early as *Yick Wo* v. *Hopkins,* 118 U.S. 356, 369, Section 1977 was successfully invoked against racial discriminations with respect to property. No constitutional doubts have been expressed with respect to this first section of the 1866 Act, once it was "vindicated" by the Fourteenth Amendment (*Ogama* v. *California,* 332 U.S. 633, 640). Compare *Collins* v. *Hardyman, supra,* 341 U.S. at 659. And no one has ever suggested that it was repealed, impliedly or otherwise, by the Act of February 8, 1894 (28 Stat. 36), which was thought to have "wiped from the statute books" "every trace of the reconstruction measures" relating to the "purity in

elections" (H. Rep. No. 18, 53d Cong., 1st Sess., p. 7). Compare Mr. Justice Lamar, dissenting, in *United States* v. *Mosley*, 238 U.S. 383, 389–391, and Mr. Justice Douglas, dissenting, in *United States* v. *Classic*, 313 U.S. 299, 334–335, and in *United States* v. *Saylor*, 322 U.S. 385, 390–392. On the contrary, since that time, Sections 1977 and 1978 have been cited in several cases in this Court in support of comparable rulings [10]—often in tandem with the Fourteenth Amendment, which is repeatedly recognized as having a special relationship to the contemporary statute (see note 2, *supra*). Compare 18 U.S.C. 252 (originally § 2 of the Civil Rights Act of 1866) which has reached this Court in only four cases since its enactment in 1866, for the first time in 1940 after an apparently total repose of 75 years (*United States* v. *Classic, supra; Screws* v. *United States*, 325 U.S. 91; *Williams* v. *United States*, 341 U.S. 97; *United States* v. *Price*, 383 U.S. 787). And see *District of Columbia* v. *Thompson*, 346 U.S. 100, rejecting the contention that a law of 1872 prohibiting discrimination in places of public accommodation in the District of Columbia, actually removed from the statute books, had lost its force by implied repeal or "desuetude."

---

[10] We put to one side instances in which Sections 1977 and 1978 were cited in support of rulings banning racial discrimination in jury selection (*e.g.*, *Strauder* v. *West Virginia*, 100 U.S. 303, 311–312; *Virginia* v. *Rives*, 100 U.S. 313, 317–318) or were unsuccessfully invoked against private discriminations in employment (*Hodges* v. *United States*, 203 U.S. 1). See, also, *United States* v. *Wong Kim Ark*, 169 U.S. 649, 675, 696–699; *McLaughlin* v. *Florida*, 379 U.S. 184, 192.

It is no ground of objection that present conditions suggest new applications for the old words. As Mr. Justice Holmes observed for the Court in *United States* v. *Mosley, supra,* 238 U.S. at 388, applying the broadly worded provision before him to circumstances far removed from those which prompted its enactment, "we cannot allow the past so far to affect the present as to deprive citizens of the United States of the general protection which on its face [the statute] most reasonably affords." That same approach was followed in *United States* v. *Classic, supra,* to reach the conclusion that Sections 241 and 242 of the Criminal Code punish conduct effectively denying the right to vote in primaries, an institution unknown when those provisions were written a century earlier. And it is the principle that informed this Court's unanimous decision two Terms ago in *United States* v. *Price, supra,* which, for the first time, applied Section 241 to vindicate rights guaranteed by the Fourteenth Amendment.[11] So here, we submit there should be no resort to "ingenious analytical instruments" to avoid giving Section 1978 "a sweep as broad as its language" (383 U.S. at 801)—even though its application in the present context, unfamiliar to the framers, has no established precedent. Indeed, there is less reason for concern here than there was in the criminal prosecutions just cited. The present suit for an injunction permits the Court to make a ruling which, if novel,

[11] So, also, *United States* v. *Guest*, 383 U.S. 745, ruled, for the first time, that Section 241 protects the right to travel interstate against wholly private conspiracies.

will operate only for the future, imposing no civil or criminal liability for the past without adequate notice.[12] Compare Mr. Justice Douglas, dissenting, in *United States* v. *Classic, supra,* 313 U.S. at 331–332, 336, 341; Mr. Justice Roberts, Mr. Justice Frankfurter and Mr. Justice Jackson, dissenting, in *Screws* v. *United States, supra,* 325 U.S. at 149 *et seq.*; Mr. Justice Harlan, concurring in part and dissenting in part, and Mr. Justice Brennan, concurring in part and dissenting in part, in *United States* v. *Guest, supra,* at 773–774, 785–786. See, also, *James* v. *United States,* 366 U.S. 213, 221–222 (opinion of the Chief Justice); *Bouie* v. *City of Columbia,* 378 U.S. 347.

Finally, we stress that the application of Section 1978 to the circumstances of this case does not attempt to make it do service as a comprehensive modern housing law. By its terms, Section 1978 bars only *race* and *color* discrimination; and, whatever its broader reach, we invoke the provision here only

---

[12] Since, by hypothesis, the present argument would apply Section 1978 to conduct not taken "under color of law," individual action violating the substantive guarantees of the provision would in no event subject the offender to civil damages under 42 U.S.C. 1983 or criminal penalties under 18 U.S.C. 242 (both of which reach only acts done "under color of law"). If damages may be recovered from a single violator, it is under the common law of the State (see 42 U.S.C. 1988) or by virtue of a remedy fashioned by the federal courts (see *Wheeldin* v. *Wheeler*, 373 U.S. 647, 660–667) (dissenting opinion of Mr. Justice Brennan). On the other hand, when "two or more persons" join in a conspiracy to violate Section 1978, whether or not they are acting "under color of law," federal statutes expressly makes them liable both to pay civil damages and to suffer criminal penalties. 42 U.S.C. 1985(3); 18 U.S.C. 241.

against a massive effort to exclude an entire ethnic group from a community. There is no occasion to decide in this case whether individual real estate transactions or occasional acts of discriminations are affected. Our present submission is confined to the proposition that Section 1978 comes into play when official or unofficial action has the practical effect of so severely restricting Negroes (or another racial class) from renting or buying homes in an area that it may fairly be said that they no longer "have the same right * * * as is enjoyed by white citizens * * * to * * * purchase [and] lease * * * real * * * property."

It is already well-settled that local zoning ordinances which "fence out" Negroes from chosen neighborhoods offend the statute. *Buchanan* v. *Warley,* 245 U.S. 60. And so does judicial enforcement of private restrictive covenants with the same purpose and effect. *Hurd* v. *Hodge,* 334 U.S. 24. Applying Section 1978 here would add only those relatively rare instances in which wholly private action can achieve discrimination on a comparable scale. Normally, that would require a perfect concert of action by a substantial number of property owners—perhaps an unlikely eventuality today. But, occasionally, as here, a single individual or corporation is in a position to control entry to an entire residential community. Our submission is only that, in those circumstances, Section 1978 is equally applicable although the result is accomplished without active governmental intervention.

It remains to demonstrate that Section 1978, fairly read, governs our case. We consider in turn three possible objections to such an application: (1) that the provision merely guarantees to Negroes (and other non-white citizens) the same abstract right to purchase, lease and hold property as is enjoyed by whites, free of measures (almost necessarily laws) which wholly disable or incapacitate them on account of their race; (2) that, at all events, Section 1978 reaches only "State action" or conduct taken "under color of law"—which, for the purposes of the present argument, we assume is not involved here; and, finally, (3) that (whatever its scope in other respects) the statute does not control a voluntary refusal to sell or lease, but combats only outside forces inhibiting the action of willing parties.

A. SECTION 1978 REACHES ANY SUBSTANTIAL "FENCING OUT" OF AN ENTIRE RACIAL CLASS

Because it was originally enacted in furtherance of the Thirteenth Amendment (before the adoption of the Fourteenth) and speaks in general terms of the "right * * * to inherit, purchase, lease, sell, hold, and convey" property, Section 1978 might be thought merely to lift the former total legal disability of slaves to acquire any interest in real property. But that would be a grudging reading of broad language, at odds with the teaching of *Mosley* and *Classic* and *Price* (*supra*, p. 24), which, moreover, would present some purely textual difficulties. Nor would such a construction faithfully reflect the setting of 1866 or subsequent history. And, at all events, confining Sec-

tion 1978 to that narrow scope would require repudiation of several decisions in this Court, including *Buchanan* v. *Warley* and *Hurd* v. *Hodge, supra.*

1. The statutory text itself indicates a purpose to grant more than bare legal capacity to acquire real property

On its face, Section 1978 certainly need not be read as merely granting the Negro legal capacity to hold property. To be sure, what is guaranteed is a "right" to inherit, purchase, or lease. But that is not necessarily a narrow term, wholly exhausted in the technical concept of "competence." A sufficient example is that of the "right to vote" which has been held to include not only official recognition of qualification, but the right actually to cast a ballot (*Ex parte Yarbrough,* 110 U.S. 651), to have it counted (*United States* v. *Mosley, supra,* 238 U.S. at 386; *United States* v. *Classic, supra,* 313 U.S. at 315), and not to have its effect diluted by illegal votes (*United States* v. *Saylor, supra,* 322 U.S. at 388–389) or other devices (*Gray* v. *Sanders,* 372 U.S. 368, 380). And, most relevantly, the "right to vote" without discrimination on account of race has been held to preclude measures which deliberately "fence out" from a constituency otherwise qualified voters—who remained free to vote elsewhere. *Gomillion* v. *Lightfoot,* 364 U.S. 339. So, here, there is no reason to suppose that Section 1978 makes an empty promise which is satisfied if Negroes are theoretically eligible to buy or rent a home, although, in fact, they are banned (by law or otherwise) from many or most communities. The more natural construction is that the "right" to acquire property

includes at least a guarantee against being absolutely "fenced out" from any substantial area.

What is more, any other result would be difficult to square with the precise wording of Section 1978. Indeed, the provision does not grant Negroes "the right" to acquire property, but, rather, "the *same* right * * * as is enjoyed by white citizens." Thus, there is a guarantee of equal treatment, which is violated if the Negro, although recognized as having capacity to hold property, is in any substantial respect disadvantaged in the enjoyment of his right. The most obvious instance of such an abridgment or dilution of the right is that in which the Negro is told: "You may buy or rent a house, but not in this community." Surely, in this hypothesis, the excluded class does not "enjoy" the "same right" as those who are free to reside anywhere.

2. The legislative history and background of the statute confirm this broader purpose

What the text itself suggests is confirmed by relevant history. The Civil Rights Act of 1866 was written against the background of the so-called "Black Codes" of the Southern States, then recently adopted to supplant the old slave codes which the Thirteenth Amendment made obsolete. These new laws—defining the rights and duties of both the recently emancipated former slaves and those who were already "free persons of color"—certainly did not accord the Negro equal treatment. Indeed, as has been noted here, in some cases they worked a practical re-enslavement of the race. See, *e.g., Bell* v. *Maryland,* 378 U.S. 226,

247 (opinion of Mr. Justice Douglas), 303, n. 21 (opinion of Mr. Justice Goldberg); and see, *Slaughter-House Cases,* 16 Wall. 36, 70. But, however discriminatory they were, it does not appear that any of the Black Codes denied the capacity of the Negro to acquire and hold property, real or personal. On the contrary, one standard history, summarizing these laws, observes that they "conferred upon the freedmen fairly extensive privileges [and] gave them the essential rights of citizens to contract, sue and be sued, own and inherit property * * * " (Morison and Commager, *The Growth of the American Republic* (1950), p. 17, as quoted by Mr. Justice Douglas in *Bell* v. *Maryland, supra,* 378 U.S. at 247-248, n. 3). See McPherson, *The Political History of the United States of America During the Period of Reconstruction* (1871), pp. 29-44. Even South Carolina, reportedly one of the two least generous States on this matter (Morison and Commager, *op. cit. supra;* 1 Oberholtzer, *A History of the United States Since the Civil War* (1936), p. 129), expressly ordained in December 1865 that, "although [persons of color] are not entitled to social or political equality with white persons, they shall have the right to acquire, own, and dispose of property * * *." See Sen. Ex. Doc. No. 6, 39th Cong., 2d Sess., p. 202. Comparable provisions were common. See the laws of North Carolina and Georgia and the constitution of Texas, summarized in H. Ex. Doc. No. 118, 39th Cong., 1st Sess., pp. 3, 18, 33. Thus, the real problem for the Congress in 1866 was *not* to nullify local statutes which wholly

disabled the Negro with respect to property, or even to clarify his status on this score.

What, then, was the congressional purpose in securing to the freedman "the same right * * * as is enjoyed by white citizens * * * to inherit, purchase, lease, sell, hold, and convey real and personal property"? Were the legislators of 1866 knowingly indulging in a vain and empty gesture? Or were they ignorant of the true conditions of the South? The first suggestion would be an unworthy accusation against the great emancipators of the 39th Congress. They were realists, not theorists. We may take the word of Senator Trumbull, the Chairman of the Judiciary Committee and the sponsor of the Civil Rights Act of 1866, that he and his colleagues were not interested in declaring "abstract truths and principles," but, rather, in securing "practical freedom" for the Negro. Cong. Globe, 39th Cong., 1st Sess., p. 474. See, also, Senator Howard at *id.*, pp. 503–504. Nor is the vigorous opposition encountered in both Houses and the President's veto consistent with the view that the measure merely solemnized what no one contested, that the colored man was now legally competent to own and acquire property.

The actual problem was somewhat different: it was that many of the Southern States, while conceding the legal capacity of the Negro to hold all kinds of property and to engage in real estate transactions, severely limited the practical exercise of these new rights. Sometimes the theoretical right to purchase or lease a home was indirectly defeated by a requirement that

the freedman be employed by a white man and live on the master's property. Morison and Commager, *op. cit. supra;* see, *e.g.,* the Louisiana law reprinted in S. Ex. Doc. No. 6, *op. cit. supra,* at p. 181. Elsewhere, severe restrictions on freedom of movement must have had much the same effect. See, *e.g.,* the Mississippi Statute reprinted in S. Ex. Doc. No. 6, *op. cit. supra,* at 194. But there were also express provisions barring Negroes from living in certain areas, except as servants, by prohibiting them from renting or buying real estate there. Mississippi excluded them as landholders in the country. See S. Ex. Doc. No. 6, *op. cit. supra,* p. 193. In Louisiana, there were local regulations prohibiting Negroes from having their own homes or business premises in towns (see S. Ex. Doc. No. 2, 39th Cong., 1st Sess., pp. 92, 95), and comparable restrictions in some rural areas. See Fleming, *Documentary History of Reconstruction* (1906), p. 279. More limited handicaps were common also: freedmen were not permitted to own or operate certain businesses (see S. Ex. Doc. No. 6, *op. cit. supra,* at p. 204, 215) and their contracts with respect to property were encumbered with special formalities. See, *e.g.,* the laws of North Carolina and South Carolina, reprinted in Sen. Ex. Doc. No. 6, *op. cit. supra,* at pp. 198, 216.

This was the evil to which Congress was addressing itself: not the absolute disabling of the Negro, but the serious practical abridgments placed on his freedom to contract and his rights with respect to property. The examples we have given were cited again and again in the debates on the Civil Rights Bill and on

companion measures. Cong. Globe, 39th Cong., 1st Sess, pp. 39, 111, 474, 475, 516–517, 603, 1755, 1759. To be sure, there were occasional overstatements. The law of Mississippi was sometimes said to bar Negroes from holding real property anywhere in the State, (*e.g., id.* at pp. 1160, 1759); but, as often, it was correctly represented as applying only to rural areas. *E.g., id.* at pp. 39, 111. And provisions of local law nominally guaranteeing the Negro the right to acquire and hold property were brought to the attention of Congress. *E.g., id.* at pp. 1755, 1785. In sum, the authors of the Civil Rights Act of 1866 were obviously well aware of the true legal status of the freedman in the South and were concerned to combat *discriminations,* not *disabilities.* Practical equality of right was the aim of their work. See *id. at* 1117–1118, 1293, 1413. It is, therefore, no accident that the law they framed is formulated in those terms: the Negro shall "enjoy" "the *same* right" as whites.

The true purpose of Section 1978 is sufficiently revealed in the circumstances of its original enactment in 1866. But, as already noted, the provision we know derives more directly from the Revised Statutes of 1874[13] and the re-enactment of the Civil Rights Act

---

[13] Although the congressional mandate was somewhat restricted (14 Stat. 74), the Revision of 1874, formally enacted into law (see R.S. § 5601), in fact worked important substantive changes in the prior statutes which have been accepted as effective. See, *e.g.*, the significant expansion of Section 2 of the Civil Rights Act of 1866, the progenitor of 18 U.S.C. 242, recognized in *Screws* v. *United States*, *supra*, 325 U.S. at 99–100, 120–125, and *United States* v. *Price*, *supra*, 383 U.S. at 802–803. See, also, *United States* v. *Mosley*, *supra*, 238 U.S. at 388 (in-

in 1870, after the adoption of the Fourteenth Amendment. Accordingly, it is relevant to note the conditions then prevailing which were deemed to require reaffirming the guarantee of non-discrimination with respect to the "right to purchase and lease real property."

The fact is that most, if not all, of the former Confederate States, now under the control of "reconstructed" legislatures, had by that time progressed so far as formally to ban racial discrimination even in privately-owned places of accommodation. *E.g.,* La. Const. 1868, Art. 13; La. Acts 1869, p. 37; La. Acts 1870, p. 57; La. Acts 1873, p. 156; 14 S.C. Stat. 179; Ga. Laws 1870, pp. 398, 427–428; Ark. Laws 1873, pp. 15–19; Miss. Laws 1873, pp. 66; Fla. Laws 1873, p. 25. And see, Stephenson, *Race Distinctions in American Law* (1910), pp. 115–116; 2 Fleming, *Documentary History of Reconstruction* (1907), pp. 285–288. And those laws were not wholly unenforced. See, *e.g., Sauvinet* v. *Walker,* 92 U.S. 90; *Hall* v. *DeCuir,* 95 U.S. 485; *Joseph* v. *Bidwell,* 28 La. Ann. 382; *Donnell* v. *State,* 48 Miss. 661. Indeed, the premise of the decision here in the *Civil Rights Cases,* 109 U.S. 3, was that the federal public accommodations law enacted in 1875 was a needless intrusion because racial

---

volving the 1874 revision of what is now 18 U.S.C. 241); *Georgia* v. *Rachel,* 384 U.S. 780, 789–790 (involving the 1874 revision of what is now 28 U.S.C. 1443). On the other hand, the Revision published in 1878—clearly intended only to collect the laws then in force without changing their scope (19 Stat. 268; and see the Preface by Commissioner Boutwell to the 1878 Edition of the Revised Statutes, pp. v–vi)—is relevant only in that it did not drop Section 1978 as "obsolete."

discriminations in such facilities were then barred "by the laws of all the States." *Id.* at 25; see, also, *id.* at 19, 24. Thus, it is plain that in re-enacting the 1866 Act in the 1870's Congress could not have been concerned about any failure of local law to recognize the abstract right of the Negro to acquire or hold real property. As we shall presently show, the congressional focus, from 1870 on, was no longer fixed on hostile statutes. The new problem for the Congress was, rather, unofficial conduct—notably the doings of the Ku Klux Klan (see *United States* v. *Mosley, supra,* 238 U.S. at 387–388; *Collins* v. *Hardyman, supra,* 341 U.S. at 662)—and discriminatory acts of officials, taken independently of State law (see *Monroe* v. *Pape,* 365 U.S. 167, 174–183). These no doubt included efforts to fence out Negroes from certain areas—and it is in that light that we should appraise the renewed declaration of the broad guarantees announced in Secton 1978.

3. The jurisprudence of this Court gives the statute a broader reach

We turn, finally, to the cases in this Court construing Section 1978. Significantly, each of them supports our submission that the provision does more than annul State laws which deny the Negro (or other non-white citizens) capacity to buy or rent a home.

The first direct application of Section 1978 to reach this Court was *Buchanan* v. *Warley, supra,* decided here in 1917. It was there expressly held that "the Fourteenth Amendment and these statutes [Section 1977 and 1978]" (245 U.S. at 79) invali-

dated a local ordinance which did not generally disable Negroes from buying or renting real estate within the city, but merely forbade either race to occupy a dwelling in a block where the other race predominated. That ruling was followed in two subsequent decisions involving comparable ordinances. *Harmon* v. *Tyler,* 273 U.S. 668; *Richmond* v. *Deans,* 281 U.S. 704. While the *per curiam* disposition of those cases did not afford occasion to invoke Section 1978 expressly, it is fair to suppose that the citation of *Buchanan* v. *Warley* as authority endorses the holding that the statute, as well as the Constitution, barred the discrimination.

At all events, the *Buchanan* ruling that Section 1978 reaches a discriminatory fencing out of Negroes from certain blocks, otherwise legally eligible to buy or rent a home in the area, is confirmed by the unanimous opinion in *Shelley* v. *Kraemer, supra,* where the Court treats the statute (which is fully quoted) and the Fourteenth Amendment as co-extensive in this respect. 334 U.S. at 10–12. Indeed, after setting forth the cases just cited, the Court is at pains to emphasize that they recognize not only the federal right of a white seller to sell or lease to Negroes notwithstanding local law restrictions but also the right of "those desiring to acquire and occupy property and barred on grounds of race or color." *Id.* at 12. See, also, *Barrows* v. *Jackson,* 346 U.S. 249, 254–255, 258–260.

These decisions, we submit, support our construction of Section 1978 as voiding measures which, without wholly denying the right of Negroes to purchase or lease real estate, substantially abridge the exercise

of that right by excluding the class from a particular area. We might also cite *Oyama* v. *California, supra,* which reads the statute broadly to condemn a State law severely handicapping the acquisition of real property by citizens of Japanese ancestry, although it recognized their right to acquire. But the dispositive holding on the point is *Hurd* v. *Hodge, supra.* In that case, the Court, expressly declining to decide the constitutional question presented (334 U.S. at 30), rested its decision, at least alternatively, on Section 1978. *Id.* at 30–34). The ruling was that the statute barred judicial enforcement of racially restrictive covenants with respect to certain city lots because that action—which would have nullified their contracts and compelled their eviction from the premises—denied the Negro purchasers "the same right 'as is enjoyed by white citizens * * * to inherit, purchase, lease, sell, hold, and convey real and personal property.' " *Id.* at 33–34.[14] Since only two-thirds of the lots in a single block in the District of Columbia were covered by the covenants in suit (*id.* at 26), it could not be clearer that the Court there construed Section 1978 as reaching any substantial exclusion from housing on racial

[14] We do not read the opinion dismissing reliance on Section 1978 in *Corrigan* v. *Buckley*, 271 U.S. 323, 330–331, to the contrary. That decision, as explained in *Shelley* v. *Kraemer*, *supra*, 334 U.S. at 8–9, 13, and *Hurd* v. *Hodge*, *supra*, 334 U.S. at 28–29, 31, merely held that a racially restrictive covenant of itself did not offend federal law. But see, *infra*, pp. 38 *et seq.* At all events, of course, those later decisions supersede any implication in *Corrigan* that Section 1978 is concerned only with general legal capacity to acquire and lease real property.

grounds—including, of course, the far more significant fencing-out involved in the present case.

Our previous discussion shows that ruling to be entirely faithful to the text of the statute and its legislative history. It remains, however, to show that Section 1978 annuls measures which have such an effect, although not in the shape of laws or official acts. The decisions invoked here do not go so far. Indeed, there is language to the contrary in some of the opinions. *E.g., Hurd* v. *Hodge, supra,* 334 U.S. at 31. We now address ourselves to that separate question.

B. SECTION 1978 REACHES CONDUCT NOT TAKEN "UNDER COLOR OF LAW"

Before proceeding further, it may be well, once again, to stress the limited reach of our argument. Our concern is entirely with wholesale discriminations which have the practical effect of wholly excluding a racial class from a substantial area. As we have already noted, that result was once commonly accomplished by law. But the same "fencing out" can be achieved by concerted private action, or even, in rare cases, by the act of a single large landowner. That is, of course, a more acute problem today, residential segregation ordinances and judicial enforcement of restrictive covenants having been condemned. Yet, the potentiality always existed and we submit this alternative means to the same end is equally forbidden by Section 1978.

1. Nothing in the text or context of the statute confines its reach to State action

We begin with the text of the statute:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

Nothing in this language suggests that Section 1978 reaches only laws, or official acts, or conduct taken "under color of law." On their face, the words plainly cover any conduct which prevents Negroes and other non-whites from enjoying an equal opportunity to rent or purchase a home.

Certainly, nothing to the contrary is to be inferred from the description of the guarantee as a "right." We have already shown that "right" in this context cannot be read to mean only "legal capacity." Nor does the choice of that term of itself imply that only an immunity from hostile State action is conferred. In the usage of the time, "rights," whether viewed as created or merely "secured" by law, did not run against the sovereign alone. And that remains true today. One need only consult the public accommodation laws of 1875 and 1964, which control only private action: the first is entitled "An act to protect all citizens in their civil and legal rights" (18 Stat. 335); the second, the "Civil Rights Act of 1964" (Pub. L. 88–352, § 1, 78 Stat. 241). And see the Court's opinion in *United States* v. *Guest, supra,* 383 U.S. at 757–760, which repeatedly refers to the constitutional "right" to travel from one State to another, good against both official and private interference.

If it were not for contrary intimations in opinions of this Court, and perhaps one holding, there might be no occasion to go beyond the words of the statute to assert that, in an appropriate case, it reaches private conduct—assuming, as we later show (*infra*, pp. 51–57), that there is no constitutional objection to so reading Section 1978. Under the circumstances, however, we shall briefly explore every possible objection to construing the provision as controlling action not taken "under color of law."

We consider first the reasons suggested by an aside of the opinion in the *Civil Rights Cases, supra*, 109 U.S. at 16–17, for confining Section 1978 to State action. Although that decision is not directly concerned with our provision and construes it only tentatively in a digression, the importance of the precedent justifies consideration.

a. The original text of 1866. The initial point made in the opinion is that the original text of 1866 ended with the words "any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding," dropped in the Revised Statutes. 109 U.S. at 16. It is of course contrary to the established rule governing the interpretation of the Revised Statutes of 1874 to go behind a clear text to an earlier version of the law. See *United States* v. *Bowen*, 100 U.S. 508, 513; *Vietor* v. *Arthur*, 104 U.S. 498, 499–500; *Hamilton* v. *Rathbone*, 175 U.S. 414, 419–421; *Benson* v. *Henkel*, 198 U.S. 1, 13; and see *United States* v. *Mosley, supra*.[15] But, at all events, we submit that the quoted phrase in the

[15] See note 13, *supra*.

original provision lends no support to the argument that the design was only to reach State action.

Read as words of limitation, the reference to local laws would make our provision inoperative whenever the State acted by executive or judicial proceedings independently of any legislative directive or authorization. That is, of course, directly contrary to the ruling in *Hurd* v. *Hodge, supra,* which holds Section 1978 applicable to judicial enforcement of private covenants wholly unrelated to any legislative declaration. And such a construction of Section 1 of the Civil Rights Act of 1866 would hardly be consistent with the scope given to Section 2 (now 18 U.S.C. 242) in *Classic, Screws, Williams* and *Price,* all involving unauthorized conduct of public officials. Cf. *Monroe* v. *Pape, supra.* But the basic fact is that the phrase "any law, etc., to the contrary, notwithstanding" was inserted for emphasis, not by way of limitation.

Indeed, it seems obvious that the quoted words merely declare the supremacy of the federal statute over inconsistent local laws, if "any" there be. The formula is borrowed from the Supremacy Clause of the Constitution itself. See Art. VI, cl. 2. And it was a common clause in the declaratory provisions of Reconstruction legislation. See, *e.g.,* Enforcement Act of May 31, 1870, §§ 1, 16 (16 Stat. 140, 144); Act of February 28, 1871, §§ 5, 6, 19 (16 Stat. 433, 434, 435, 440).[16] To be sure, the reference to contrary State laws

[16] Another equivalent formulation is illustrated by another provision of § 16 of the Enforcement Act of 1870: "and any law

suggests their probable existence, present or future. But it hardly follows that the federal right created was meant to be ineffective if it encountered no hostile State action. Clearly, the compilers of the Revised Statutes were fully warranted in deleting these words as wholly superfluous in 1874 when the supremacy of federal statutes implementing the post-War Amendments was more clearly understood.[17]

b. The limited scope of Section 2 of the 1866 Act. At least superficially more telling for the contention that Section 1978 controls State action alone is a wholly different point made by the opinion in the *Civil Rights Cases*: that Section 2 of the 1866 Act, enforcing the first section from which our provision is derived, punishes only conduct taken "under color of law." 109 U.S. at 16–17. Presumably, the suggestion is that if Section 1 had meant to prohibit wholly private acts of discrimination, the sanctions of Section 2 would have been made applicable to such conduct. In our view, however, that reasoning is not compelling.

In the first place, symmetry is not the hallmark of Reconstruction legislation. In fact, almost every measure of the period juxtaposes provisions which bear only against officials with others which control private

---

of any State in conflict with this provision is hereby declared null and void." See, also, the comparable clause in § 1 of the Peonage Abolition Act of March 2, 1867 (14 Stat. 546), preserved in the modern codification, 42 U.S.C. 1994.

[17] The same deletion was made in R.S. § 1977, whose antecedents are § 1 of the Civil Rights of 1866 and § 16 of the Enforcement Act of 1870. Somewhat inconsistently, the phrase is retained in R.S. § 2004, now 42 U.S.C. 1971(a)(1).

action.[18] That is sufficient reason to resist the temptation to construe one provision by the next, even in the same Act. But if that approach were followed here, it would seem to lead in the opposite direction. Indeed, why expressly limit the application of the penalty to deprivations "under color of law" if the right involved itself runs only against official action?

At all events, it would not be remarkable if the Congress of 1866 had deemed it appropriate to confine criminal sanctions to State officials, bound by oath and duty to support the supreme law, while allowing only civil remedies against ordinary citizens. Or it may have been thought unnecessary to impose federal penalties where there were no State laws condoning abridgment of the rights declared in Section 1 because, in that situation, it was assumed the State itself would punish the offender under local ordinances implementing the national law. See Cong. Globe, 39th Cong., 1st Sess., pp. 1758, 1785. Neither hypothesis

[18] Thus, while Sections 2 and 3 of the Enforcement Act of May 31, 1870 (16 Stat. 140) reached only officers, Section 4 (invalidated in *United States* v. *Reese*, 92 U.S. 214), Section 5 (invalidated in *James* v. *Bowman*, 190 U.S. 127), and Section 6 (now 18 U.S.C. 241), reached private conspiracies as well. So it is with the Ku Klux Act of April 20, 1871 (17 Stat. 13): Section 1 (now 42 U.S.C. 1983) reached only acts done "under color" of State law, but Section 2 (the criminal portion of which was declared unconstitutional in *United States* v. *Harris*, 106 U.S. 629, and *Baldwin* v. *Franks*, 120 U.S. 678, the civil provision surviving as 42 U.S.C. 1985) encompassed private conspiracies. And the pattern is the same in the Act of March 1, 1875 (18 Stat. 335): Sections 1 and 2 (invalidated in the *Civil Rights Cases*, 109 U.S. 3) reached private action, while Section 4 (sustained in *Ex parte Virginia*, 100 U.S. 339, now 18 U.S.C. 243) reached only officials.

suggests that the potential scope of Section 1 was restricted to acts "under color of law." [19]

No doubt, initially, the penal section of the Civil Rights Act of 1866 was viewed as the most important, for, as we have seen, the principal concern at first was to combat the Black Codes and to punish those who implemented them. But long before the text of Section 1978 became settled in the Revised Statutes of 1874, the focus had substantially changed and the broader scope of Section 1 took on new significance. These developments are relevant both because the reenactment of our provision in 1870 and 1874 justifies a con-

---

[19] At one point during the debates on the Civil Rights Bill, Representative Loan inquired of the Chairman of the House Judiciary Committee (Wilson of Iowa), who seemed to be in charge of the measure, "why the committee limit the provisions of the second section to those who act under the color of law. Why not let them apply to the whole community where the acts are committed?" The following colloquy ensued (Cong. Globe, 39th Cong., 1st Sess., p. 1120):

> Mr. WILSON, of Iowa. That grows out of the fact that there is discrimination in reference to civil rights under the local laws of the States. Therefore we provide that the persons who under the color of these local laws should do these things shall be liable to this punishment.
>
> Mr. LOAN. What penalty is imposed upon others than officers who inflict these wrongs on the citizens?
>
> Mr. WILSON, of Iowa. We are not making a general criminal code for the States.
>
> Mr. LOAN. Why not abrogate those laws instead of inflicting penalties upon officers who execute writs under them?
>
> Mr. WILSON, of Iowa. A law without a sanction is of very little force.
>
> Mr. LOAN. Then why not put it in the bill directly?
>
> Mr. WILSON, of Iowa. That is what we are trying to do.

Nothing in this exchange suggests that the scope of Section 1 was equally narrow.

struction in light of then prevailing conditions and because other related legislation of these later years furnishes an authoritative indication of the original congressional intent.

It is sufficiently known that by 1870 one of the most serious threats to the rights of Negroes in the South was the Ku Klux Klan, and other comparable organizations, usually operating wholly outside the law and often against the constituted local authorities. See, *e.g.*, Stampp, *op. cit. supra,* at pp. 198–204. And, quite naturally, much of the congressional legislation of the time was aimed at these unofficial conspiracies. *E.g.*, §§ 4, 5 and 6 of the Enforcement Act of 1870, § 2 of the Ku Klux Klan Act of 1871, *supra* n. 18. This concern is evident in two of the surviving provisions of the Acts of 1870 and 1871, Section 241 of the Criminal Code and 42 U.S.C. 1985. See *United States* v. *Mosley, supra,* 238 U.S. at 387–388; *United States* v. *Price, supra,* 383 U.S. at 804–805; *Collins* v. *Hardyman, supra,* 341 U.S. at 662; and see *Monroe* v. *Pape, supra,* 365 U.S. at 174–176, 200, 257. Against this background, it would be difficult to interpret the reenactment of the first section of the Civil Rights Act of 1866 as confirming rights only against governmental invasion. In fact, the available evidence is clearly to the contrary.

Of particular interest is 18 U.S.C. 241, derived from Section 6 of the 1870 Act—Section 18 of which re-enacted our provision. The reach of that provision extends to wholly private conspiracies directed against a "citizen" in the exercise of "any right or privilege granted or secured to him by the Constitution or laws

of the United States." As the relevant legislative history makes clear, the focus was on the "rights and immunities of American citizenship" as announced by the Fourteenth and Fifteenth Amendments and implementing legislation. See Appendix to opinion of the Court in *United States* v. *Price, supra,* 383 U.S. at 807–820.[20] But, constitutional guarantees aside, what were the statutory rights and privileges of citizens intended to be protected? Except for voting rights—already vindicated by Sections 4 and 5 of the 1870 Act—the only apparent legislative declaration of citizenship rights in 1870 was Section 1 of the Civil Rights Act of 1866, now expanded and re-enacted.[21] Doubtless, one of the objects of the new law was to punish wholly private conspiracies directed against these rights, which, although good against all interference, had theretofore been protected by penal sanctions only from official invasion. That was of

---

[20] The Court's Appendix in *Price* reproduces the whole of Senator Pool's speech on sponsoring Sections 5, 6 and 7 of the Enforcement Act of 1870, which is characterized in the opinion as "the only statement explanatory of [18 U.S.C. 241] in the recorded congressional proceedings relative to its enactment" (383 U.S. at 805).

[21] As already noted, Section 18 of the Enforcement Act of May 31, 1870, re-enacted the whole of the Civil Rights Act of 1866. In addition, Section 16 of the 1870 Act reiterates the rights declared in 1866, except those relating to property, adding new guarantees and expanding the coverage to encompass not only citizens, but all persons, including aliens. Section 1977 of the Revised Statutes, 42 U.S.C. 1981, carries forward this expanded provision. See *Takahashi* v. *Fish Comm'n, supra,* 334 U.S. at 419.

course the necessary premise of the ruling in *United States* v. *Morris,* 125 Fed. 322 (E.D. Ark.), that 18 U.S.C. 241 (then R.S. § 5508) would punish a wholly private conspiracy of hostile whites seeking to prevent a Negro from exercising his right under Section 1978 to lease a farm in the area, and of Mr. Justice Bradley's *dictum* to the same effect in his opinion, on circuit, in *United States* v. *Cruikshank,* 1 Woods 308, 319, 25 Fed. Cas. 707, 712.[22] Thus, it is apparent that the Congress of 1870—presumptively faithful to the original understanding—viewed the rights declared in 1866 and later codified in Section 1978 as something more than mere immunities from hostile State action.

[22] The fact that 18 U.S.C. 241 has not been invoked against a private conspiracy directed at the exercise of rights secured by Section 1978 since 1903 does not weaken our argument as to the congressional understanding of 1870 or 1866. Indeed, so far as we are aware, there has likewise been no prosecution under Section 241 for invasion of such rights by public officials, whether implementing a local racial zoning ordinance or acting on their own authority. One explanation is that the 1906 ruling in *Hodges* v. *United States*, 203 U.S. 1, dismissing an indictment under 18 U.S.C. 241 against private conspirators charged with invading rights secured by Section 1977, cast doubt on the constitutional validity of Section 1978 as Thirteenth Amendment legislation. As Fourteenth Amendment rights, the guarantees of Section 1978 were deemed beyond the scope of 18 U.S.C. 241 under *United States* v. *Williams*, 341 U.S. 70, until that decision was repudiated two Terms ago in *United States* v. *Price*, *supra*. And, at all events, until *United States* v. *Guest*, *supra*, the characterization of Section 1978 as Fourteenth Amendment legislation was thought to confine its reach to conduct taken "under color of law", pursuant to the doctrine of the *Civil Rights Cases*, *supra*.

2. The constitutional doctrines of the Reconstruction period would not have inhibited the attempt to reach wholly private action

It remains only to inquire whether constitutional limitations oppose a construction of the statute that would make it effective against wholly private action. There are two aspects to the question: the first is whether the constitutional doctrines prevailing in the Congresses of 1866, 1870 and 1874, which originally enacted or re-enacted our provision, were such as to preclude them from attempting to reach private conduct in this area; the second is whether there are, in fact, constitutional obstacles to so reading Section 1978—whatever the views entertained in the Reconstruction period.

There is no basis for supposing that constitutional doubts inhibited congressional efforts to reach private action against Negro property rights during the Reconstruction decade. Of course, when the Civil Rights Act of 1866 was passed, the "State action" theory, premised on the language of the Fourteenth Amendment, not yet framed, had not been developed. There were, to be sure, some who doubted whether the Civil Rights Act was fully authorized by the Thirteenth Amendment, which was repeatedly invoked as the principal source of congressional power to enact the measure. But those objections—held by only a minority—had nothing to do with our problem. No one suggested that Thirteenth Amendment legislation could not constitutionally reach private action. On the contrary, the very next month, the Thirty-Ninth Congress passed a statute against kidnapping with a view

to enslavement which plainly governed wholly private conduct (Act of May 21, 1866, 14 Stat. 50, now 18 U.S.C. 1583), and, at the following session, it enacted the Anti-Peonage law with a comparable scope (Act of March 2, 1867, 14 Stat. 546, now 18 U.S.C. 1581 and 42 U.S.C. 1994). See *Clyatt* v. *United States,* 197 U.S. 207, 216–218. Nor has this Court ever questioned the proposition that laws implementing the Thirteenth Amendment may operate against individuals acting on their own authority. See *Slaughter-House Cases,* 16 Wall. 36, 78, 80; *Civil Rights Cases, supra,* 109 U.S. at 20, 23; *Clyatt* v. *United States, supra.*

Although the invocation of the Thirteenth Amendment is fully sufficient to show that the Congress of 1866 entertained no doubt of its power to reach private action by the first section of the Civil Rights Act, we advert to an additional reason supporting that conclusion. The debates on the measure confirm the indication of the text that Section 1 was viewed as declaring rights of American citizenship. See Cong. Globe, 39th Cong., 1st Sess., pp. 41, 474–475, 1119, 1294, 1757, 1835–1836. As such, these rights could of course be implemented by "primary and direct" legislation protecting them against all interference, public or private. See *Slaughter-House Cases, supra,* 16 Wall. at 78; *United States* v. *Guest, supra,* 383 U.S. at 757–760.[23] To be sure, one can debate the assump-

[23] Obviously, if Congress may punish a private conspiracy interfering with the exercise of rights and privileges of American citizenship, it may also declare them by positive law.

tion of 1866 that the right freely to acquire and hold property is a right of *national,* rather than State, citizenship (see *Slaughter-House Cases, supra,* 16 Wall. at 76–78). So, also, *Paul* v. *Virginia,* 8 Wall. 168, and later cases undermine the reliance of the 39th Congress on the Privileges and Immunities Clause of the original Constitution (Art. IV, § 2) as a source of power to define and secure federal citizenship rights. But see, Antieau, "Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four," 9 Wm. & M.L. Rev. 1. Right or wrong, however, it is enough that these views prevailed in the Congress of 1866 and that, under then settled authority (*Prigg* v. *Pennsylvania,* 16 Pet. 539, 615–620; *Kentucky* v. *Dennison,* 24 How. 66, 104–105), they authorized legislation protecting the rights involved against private interference.

So much for the Congress of 1866. But what of the Congress of 1870 which re-enacted our provision after the passage of the Fourteenth Amendment? Assuming it once reached further, was Section 1978 necessarily confined to State action when it became Fourteenth Amendment legislation? The point is quickly disposed of.

In the first place, there is no indication that a majority in either House doubted the constitutionality of the Civil Rights Act before the adoption of the Fourteenth Amendment. The later reenactment was for good measure, without repudiating anything done before. Nor is it to be supposed that the Congress of 1870, if it entertained doubts about its power to

reach private action under the Fourteenth Amendment, meant to forego other sources of power when it re-enacted the 1866 statute. But, as a matter of fact, it is clear that most of the legislators of 1870 saw no such difficulty. Other measures they enacted provide sufficient proof that they did not share the limited view of Section 5 of the Fourteenth Amendment later articulated in the *Civil Rights Cases*. Indeed, as already noted, the very Enforcement Act of 1870 which re-enacted the statute of 1866 contains at least three sections unquestionably embracing private conduct, including what is now 18 U.S.C. 241 and two provisions invalidated by this Court partly on that ground. See *United States* v. *Reese*, 92 U.S. 214 (holding unconstitutional § 4 of the Act); *James* v. *Bowman*, 190 U.S. 127 (§ 5). And, as subsequent enactments make plain, that view of congressional power to enforce the Fourteenth Amendment prevailed beyond the codification of Section 1978 in the Revised Statutes of 1874. See the Ku Klux Act of April 20, 1871, partly invalidated in *United States* v. *Harris*, 106 U.S. 629, and the Civil Rights Act of March 1, 1875, struck down in the *Civil Rights Cases*, *supra*.

3. No present constitutional barrier confines the reach of the statute to State action

We turn, finally, to the question whether Section 1978 would overstep constitutional boundaries, as presently understood, if it were construed to reach wholly private action. It is, of course, relevant that those who wrote the provision thought not. To be sure, that consideration is not dispositive, as the fate of much Re-

construction legislation in this Court, from the decision in *Reese* in 1875 to *Collins* v. *Hardyman* in 1951, attests. Yet, the opinion of the contemporary legislators remains relevant because they were also the framers of the Thirteenth, Fourteenth and Fifteenth Amendments and must be assumed to have known, and observed, the limitations there announced.[24] See Flack, *The Adoption of the Fourteenth Amendment* (1908), p. 277. At all events, however, recent decisions of the Court make clear that there is no constitutional obstacle to our reading of Section 1978.

a. The congressional power to implement the Thirteenth Amendment. Before invoking the modern cases construing Section 5 of the Fourteenth Amendment as applied to the Equal Protection Clause, it is worth noting that this Court has never expressly disap-

---

[24] Thus, 35 of the 50 Senators who were sitting when the proposition for the Thirteenth Amendment was approved were present when the Civil Rights Act of 1866 was passed (Biographical Directory of the American Congress, 1774–1961, pp. 178–181, 182–185), and all but three of these who had voted in favor of the Amendment likewise voted in favor of the implementing statute (Cong. Globe, 38th Cong., 1st Sess., p. 1490; Cong. Globe, 39th Cong., 1st Sess., pp. 606, 1809). So, also, all 15 Senators who had voted in favor of the Fourteenth Amendment in 1866 and who remained when the Enforcement Act of 1870 came before the Senate voted in favor of that measure (Cong. Globe, 39th Cong., 1st Sess., p. 3042; Cong. Globe, 41st Cong., 2d Sess., p. 3809). Equally relevant to the question of the power of Congress to reach private action is the fact that, of the 39 Senators who had supported the Fifteenth Amendment (worded, like the Fourteenth, as a negative injunction addressed to the States), 28 remained and all voted in favor of the 1870 Act, which also purported to enforce that Amendment against wholly private conduct (Cong. Globe, 40th Cong., 3d Sess., p. 1641; Cong. Globe, 41st Cong., 2d Sess., p. 3809).

proved the view of the Thirty-Ninth Congress that the provision which became Section 1978 was authorized as legislation implementing the Thirteenth Amendment and, also, as an exercise of the congressional power to define and vindicate the rights and privileges of national citizenship.

Although most of the lower courts, federal and State, which had considered the question, had upheld the Civil Rights Act of 1866 before the adoption of the Fourteenth Amendment,[25] the question received little attention after 1868. There is, however, some later judicial support for the view that the 1866 Act was valid Thirteenth Amendment legislation reaching private action. We have already adverted to the ruling in *United States* v. *Morris, supra,* and the opinion on circuit in *United States* v. *Cruikshank, supra.* We should also note the *dictum* by this Court in *United States* v. *Harris, supra,* 106 U.S. at 640. In *Hodges* v. *United States, supra,* it is true, this Court held that the right to contract for employment, claimed under Section 1977, could not constitutionally be protected from a private conspiracy because it was not sufficiently related to the Thirteenth Amendment.[26] But, even assuming the continuing vitality of that holding,

---

[25] *United States* v. *Rhodes*, 27 Fed. Cas. 785 (No. 16,151); *In re Turner*, 24 Fed. Cas. 337 (No. 14,247); *Smith* v. *Moody*, 26 Ind. 299; *Hart* v. *Hoss & Elder*, 26 La. Ann. 90. Contra, *People* v. *Brady*, 40 Cal. 198 (compare *People* v. *Washington*, 36 Cal. 658; *Bowlin* v. *Commonwealth*, 65 Ky. 5).

[26] It is noteworthy, however, that the Court apparently construed Section 1977 as intending to reach private action. Else, there would have been no occasion to decide the constitutional question.

it does not necessarily follow that the right not to be wholly fenced out from a community, supported by Section 1978, is on the same footing. It is at least arguable that the right invoked in the present case is more fundamental, and that the discrimination outlawed is more obviously a vestige of slavery.

b. The congressional power to define the privileges and immunities of national citizenship. So, also, no authoritative ruling forecloses the argument that Congress may define rights of national citizenship and that Section 1978 is an appropriate exercise of this power. The dictum of the *Slaughter-House Cases, supra,* 16 Wall. at 76, apparently classifying "the right to acquire and possess property of every kind" as a privilege of State citizenship, does not resolve the issue, the Court having had no occasion there to consider the power of Congress to promote the right to a privilege of national citizenship.[27] So far as we are aware, the Court has never directly addressed itself to the question. But no reason appears why Congress may not, within proper bounds, legislate to give content to United States citizenship, whether by virtue of Section 5 and the Citizenship Clause of Section 1 of the Fourteenth Amendment (cf. *Katzenbach* v. *Morgan,* 384 U.S. 641), or by invoking the Necessary and Proper Clause (Art. I, § 8, Cl. 18) to implement the Privileges and Immunities Clause of Article IV

---

[27] Four members of the Court apparently believed that result had been achieved by the Civil Rights Act of 1866. See the dissenting opinion of Mr. Justice Field, which Chief Justice Chase, and Justices Swayne and Bradley joined, 16 Wall. at 96–97.

of the original Constitution (if, as has been persuasively argued, Antieau, *op. cit. supra,* the latter provision deals with rights of national citizenship). Cf. *Prigg* v. *Pennsylvania, supra; Kentucky* v. *Dennison, supra.* Nor is there any ground here for confining Congress to combatting hostile State action.[28] Cf. *Slaughter-House Cases, supra,* 16 Wall. at 78; *Prigg* v. *Pennsylvania, supra; Kentucky* v. *Dennison, supra; United States* v. *Guest, supra,* 383 U.S. at 757–760; and see note 23, *supra.*

c. The congressional power to enforce the Equal Protection Clause. In our view, however, the clearest constitutional foundation for Section 1978, construed as reaching private action, is the Equal Protection Clause. To be sure, although it was not the view of the Reconstruction Congresses, the opinion was long held here that Congress could not enforce that Clause against wholly private action (*e.g., Civil Rights Cases, supra*). That was, no doubt, the ground of the ruling in *Corrigan* v. *Buckley,* 271 U.S. 323, 330–331, that Section 1978 did not reach private restrictive covenants. But, whatever the doctrine of another day, it is

[28] The Citizenship Clause of the Fourteenth Amendment, unlike the other provisions of Section 1, is not in terms addressed to the States or worded in the form of a prohibition; it is an absolute declaration, stated affirmatively: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." So, also, the Privileges and Immunities Clause of Article IV is not worded merely to guarantee immunity from hostile State action, but, rather, as a positive grant of right, good against all interefrence: "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."

now settled that Section 5 of the Fourteenth Amendment authorizes the Congress to implement the Equal Protection Clause by "appropriate legislation" which controls private conduct. See *United States* v. *Guest, supra,* 383 U.S. at 761–762 (concurring opinion of Mr. Justice Clark), 774–784 (separate opinion of Mr. Justice Brennan). That is not to say, of course, that the power is wholly unconfined: there must be some relation to the goals of the Equal Protection Clause, itself viewed as affording equality only in matters regulated by local law. But Congress has a broad discretion in determining what measures are appropriate to achieving the constitutional objective of equal treatment by the State. *Katzenbach* v. *Morgan, supra,* 384 U.S. at 648–651, 653–656; *South Carolina* v. *Katzenbach,* 383 U.S. 301, 326. It is enough if one can "perceive a basis" for the conclusion that the means selected would serve to promote equal protection. *Katzenbach* v. *Morgan, supra,* 384 U.S. at 653, 656.

Judged by this standard, there can be no doubt that Section 1978, insofar as it bars any substantial fencing out even by wholly private action, is "appropriate legislation." Indeed, it is obvious that those excluded from a community will be deprived of whatever governmental benefits are enjoyed there—whether public schools, parks and recreational facilities, employment in State managed or financed activities, municipal services, or other financial aids provided for any purpose by government. Nor is it always true that equivalent public advantages will be available in the neighboring community to which the excluded class is al-

lowed entry. There is more than a colorable basis for the assumption that a fencing out on racial grounds often reserves for the residents of the area a more desirable neighborhood, favored with better schools, more spacious parks, more efficient services, better zoning, and more modern public facilities. And, at all events, it may be enough if Congress concludes that the practical and psychological handicap imposed by any massive housing segregation measure, even without official sanction, would carry over to disadvantage the victims in their relations with government. Certainly, there is here a sufficient basis to sustain barring wholesale private discrimination in housing as an incident to enforcing the mandate of equality before the law. See Cox, "Foreword: Constitutional Adjudication and the Promotion of Human Rights," 80 Harv. L. Rev. 91, at 118, 119–121.

C. SECTION 1978 REACHES VOLUNTARY RACIAL DISCRIMINATION BY LANDOWNERS

One further objection requires brief consideration. It is the suggestion that Section 1978 prohibits only *outside* interference with a transaction between a willing seller and a willing buyer, and that, indeed, far from compelling an unwilling owner to sell or lease, the statute protects his right to refuse, even on purely racial grounds. See Mr. Justice Black, dissenting, in *Bell* v. *Maryland, supra,* 378 U.S. at 329–332. This reading, to be sure, does not absolutely confine the operation of the provision to official acts or measures taken pursuant to local law, since private individuals, acting on their own authority, may attempt to inter-

vene between a willing buyer and seller by threats or violence. But, under the suggested construction, Section 1978 would not reach a voluntary conspiracy among landowners wholly to exclude Negroes from the housing they control, no matter how large an area was involved.

This view, we respectfully submit, is at odds with the congressional objective in enacting the provision. Nor is the exclusive focus on the right to dispose consistent with the text, which expressly grants a "right to * * * inherit, purchase [and] lease." In practical effect, this approach converts a Negro's right to buy or rent a home free of racial discrimination into a white man's right to deal, or refuse to deal, with whom he pleases. Surely, it needs no demonstration at this late date that such a rule is altogether one-sided: only by blinking reality can one speak of the "equal" right of the Negro to sell or refuse to sell to a white man, as he chooses. Cf. *Brown* v. *Board of Education*, 347 U.S. 483. Certainly, the Reconstruction Congress was not concerned with any such problem. The conditions of the time—not entirely changed even today—precluded any consideration of the wholly academic question whether the Negro should be free to sell his house to a white man: the practical objective was to permit the new freedmen to buy or lease housing.

Nor was the focus of those who enacted Section 1978 on the right of the white citizen to sell or rent to a Negro, free of prohibitions ordained by law or even community pressures. The typical victim of discrimination during the Reconstruction decade was not the

willing white seller who was prevented by outside forces from dealing with the Negro. Indeed, although language in opinions of this Court suggests otherwise,[29] there is some doubt whether Section 1978 was meant to confer any rights on whites. On the face of the statute, the guarantee runs only to the newly declared citizens who are to have the "same right * * * as is enjoyed by white citizens." See *Barrows* v. *Jackson, supra,* 346 U.S. at 254. And, as we have seen, the text accurately translates the congressional objective to assure the Negro an equal opportunity to establish his home or his business whenever he chose.

At all events, nothing in the decisions of this Court under Section 1978 compels restricting its operation to the situation of willing parties. To be sure, that was the fact in the cases adjudicated here. But the rationale of the opinions does not seem to turn on that circumstance. One doubts, for instance, whether the result in *Shelley* v. *Kraemer* or *Hurd* v. *Hodge* would have been different if the restrictive covenant had been invoked by the seller defending against enforcement of a sales contract which he executed without knowing the buyer's race and now wished to treat as void. Certainly, it did not save the New Orleans ordi-

[29] See *Buchanan* v. *Warley, supra,* 245 U.S. at 81, speaking of "the civil right of a white man to dispose of his property if he saw fit to do so to a person of color * * *." It is noteworthy, however, that in all the decisions here after *Harmon* v. *Tyler, supra,* the right to non-discrimination was invoked by, or on behalf of, non-whites. See *Richmond* v. *Deans, supra,* as explained in *Shelley* v. *Kraemer, supra,* 334 U.S. at 12; *Hurd* v. *Hodge, supra; Takahashi* v. *Fish Comm'n, supra; Barrows* v. *Jackson, supra.*

nance involved in *Harmon* v. *Tyler, supra,* that exclusion of Negroes could be waived upon the consent of a majority of the white residents of the area. See *Shelley* v. *Kraemer, supra,* 334 U.S. at 12.

Undoubtedly, a uniform rule of exclusion imposed by outside compulsion is often more effective in maintaining residential segregation. But, however rare the occurrence, the same result is equally offensive when achieved by the voluntary action of property owners. In 1866 there was probably no distinction to be drawn between the two situations because the white landowners—alone eligible to vote and holding all political power—simply passed a law excluding Negroes from the area. See, *e.g.,* Cong. Globe, 39th Cong., 1st Sess., pp. 1124, 1160.[30] Today that alternative is clearly foreclosed. We submit Section 1978 should not be read to condone the identical fencing out accomplished by other means.

---

[30] While the references are to the right to contract for labor, the statement of Congressman Cook is revealing (at *id.* p. 1124):

> Any combination of men in his neighborhood can prevent him from having any chance to support himself by his labor. They can pass a law that a man not supporting himself by labor shall be deemed a vagrant, and that a vagrant shall be sold. * * *

On the other hand, it is noteworthy that Congressman Windom, speaking on the same subject, does not expressly advert to the enactment of a law in the following passage (*id.* at 1160):

> Planters combine together to compel them to work for such wages as their former masters may dictate, and deny them the privilege of hiring to any one without the consent of the master; and in order to make it impossible for them to seek employment elsewhere, the pass system is still enforced. * * *

CONCLUSION

For the reasons stated, the judgments below should be reversed and the case remanded for trial.

Respectfully submitted:

RAMSEY CLARK,
Attorney General.

ERWIN N. GRISWOLD,
Solicitor General.

STEPHEN J. POLLAK,
Assistant Attorney General.

LOUIS F. CLAIBORNE,
Assistant to the Solicitor General.

BRIAN K. LANDSBERG,
Attorney.

JANUARY 1968.

288-823—68——5